No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

The Court has twice held agency fee provisions are subject to at least "exacting First Amendment scrutiny." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012). Respondents, however, hardly argue that agency fees satisfy that scrutiny. They do not attempt to prove that the fees are a least restrictive means for collective bargaining, even though *Harris* held Illinois' enforcement of its agency fee statute against personal assistants unconstitutional because Illinois failed to make that showing. 134 S. Ct. at 2639-41.

Respondents, instead, stake their case on the proposition that agency fees are subject to a lesser form of scrutiny because the fees embody employee "official duties" speech and are required by the government in its capacity as an employer. This is a new justification for *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which undermines any *stare decisis* value in adhering to that decision. If the Court rejects it, Respondents' defense of *Abood* collapses.

The Court should reject the justification. A union's bargaining against the government is not government speech expressed through employees; it is advocacy by an independent interest group. And when the government forces its employees to subsidize that advocacy, that is not a mere managerial action, but an act that infringes on employees' First Amendment rights, as citizens, to choose which political speech is worthy of their support. That infringement warrants strict or exacting scrutiny, which agency fees fail.

JURISDICTION

There is no jurisdictional question in this case because 28 U.S.C. §§ 1331 and 1343(a)(3) provide for

jurisdiction over Janus' First Amendment and 42 U.S.C. § 1983 claim. AFSCME earlier agreed that "the district court had federal question jurisdiction," Resp. C.A. Br. 3, and could "therefore grant the employees leave to file their complaint in intervention as the operative pleading." Union Defs.' Reply 12, Dist. Ct. ECF No. 115. AFSCME's newfound objection mischaracterizes the district court's action, does not implicate subject matter jurisdiction, and is meritless for reasons stated in Petitioner's Certiorari Reply Brief 1-6. "In granting certiorari, [the Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992).

ARGUMENT

I. The Court Should Overrule *Abood*.

A. *Abood* Was Wrongly Decided Because There Is No Distinction Between Bargaining With the Government and Lobbying the Government.

1. Lobbying and collective bargaining are both advocacy directed at the government to influence policies that may have political and fiscal significance. Pet.Br. 10-14. Thus, contrary to *Abood*, compelling employees to subsidize either form of advocacy infringes equally on their First Amendment rights. *Id.*

a. AFSCME argues that "agency fees embody speech engaged in as part of the employee's 'official duties.'" Br. 22 (quoting *Garcetti v. Ceballos*, 547

U.S. 410, 421 (2006)). Such speech "owes its existence to a public employee's professional responsibilities," and "reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22. It is government speech expressed through employees.

The State does not speak through AFSCME. The union is not a state employee, contractor, or agent. It is an independent advocacy group whose speech the State does not control as an employer or otherwise. The IPLRA, like other labor laws, makes it unlawful for the State "to dominate or interfere with the formation, existence, or administration of any labor organization or contribute financial or other support to it." 5 Ill. Comp. Stat. 315/10(a)(1); *see, e.g.*, 29 U.S.C. § 158(a)(2).

Not only does AFSCME not speak *for* the State, it speaks *against* the State in collective bargaining. This is an adversarial process, as AFSCME's bargaining with Illinois illustrates. Pet.Br. 6-7. It is not the government speaking to itself through a union. The union advocacy nonmembers are forced to subsidize is thus nothing like speech employees engage in on behalf of their government employer.

b. The fact that union bargaining usually occurs in nonpublic forums and under regulated procedures does not change its political nature. AFSCME Br. 41-45; State Br. 23-24; 46-48. The same can be said of lobbying. It often takes place behind closed doors or under regulated procedures, such as those provided

for in administrative procedures acts. And government officials can and do choose the lobbyists to whom they will listen and on what topics. Yet, First Amendment protections nonetheless apply to lobbying administrative agencies. *See Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

The reason is that speech is not stripped of its expressive content by the government choosing to listen and respond to that speech in nonpublic forums. *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979). In *Harris*, Illinois' decision to subject a lobbying activity—meeting and speaking with state officials to advocate for changes to a Medicaid program—to the IPLRA's collective bargaining process did not transform that petitioning into an internal, non-expressive activity. 134 S. Ct. at 2625-26. To the contrary, this Court held that bargaining involves "a matter of great public concern," and "cannot be equated with the sort of speech that our cases have treated as concerning matters of only private concern." *Id.* at 2643.

c. AFSCME asserts (at 41) that the government can sometimes restrict employee speech in its workplaces that it could not restrict in public forums. But that is due not to any diminution of the speech's expressive value, but to the government's countervailing interests. And those interests do not justify forcing unwilling employees to subsidize union advocacy. *See* Pet.Br. 23-25. For example, that Illinois can prohibit union agents from "solicit[ing] funds for a political candidate or political party" in the workplace, J.A.

142, does not make that activity non-expressive. It remains political speech. Consequently, Illinois could not constitutionally force employees to subsidize such political solicitations.

This illustrates the greater point that a state's ability to restrict one party's speech has little bearing on the constitutionality of forcing another party to pay for that speech. The First Amendment injury inflicted on individuals forced to support advocacy is not mitigated by regulation of that advocacy. Respondents' arguments that the government can sometimes restrict employee or union speech are therefore beside the point. *See* Cal. Educators' Amicus Br. 13-14.

d. Equally beside the point are arguments that the IPLRA does not restrict nonmembers from speaking in public forums. That does not reduce, much less excuse, the First Amendment injury nonmembers suffer when forced to subsidize union speech.

In compelled association and speech cases in which the Court found constitutional violations, the victims almost always were otherwise free to speak. In *Wooley v. Maynard*, motorists were free to express messages different from the motto inscribed on the license plates they were required to display. 430 U.S. 705 (1977). In *Boy Scouts of America v. Dale*, the Boy Scouts spoke against the positions of the activists with whom they were compelled to associate. 530 U.S. 640, 651-52 (2000). In *United States v. United Foods*, mushroom producers were free to express messages different from the advertising they were

compelled to subsidize. 533 U.S. 405, 411 (2001). And, in *Miami Herald Publishing Co. v. Tornillo*, "the statute in question . . . [did] not prevent[ ] the Miami Herald from saying anything it wished," in addition to the articles it was compelled to publish. 418 U.S. 241, 256 (1974). Yet, the Court held each instance of compelled association or speech unconstitutional.

2. Turning to contract administration, Respondents falsely accuse Janus of arguing that every union grievance has political importance, and retort that many do not. State Br. 48-49; AFSCME Br. 45. That is not responsive to Janus' actual position (at 14-15) that union advocacy to adopt policies and union advocacy to enforce those policies are "complementary aspects of the same expressive conduct."

Even if uncoupled, AFSCME admits (at 44) that "[a]lmost every personnel issue may affect the public fisc, particularly *when aggregated* across many public employees" (emphasis added). The Court views union activities in the aggregate. *See Harris*, 134 S. Ct. at 2642-43 & n.28. It must, as nonmembers are forced to pay for union "contract administration" activities as a whole. 5 Ill. Comp. Stat. 315/6(e). This includes both inconsequential and consequential grievances, such as AFSCME's grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State v. AFSCME Council 31*, 51 N.E.3d 738, 740 & 742 n.4 (Ill. 2016). As a whole, union contract enforcement activities have political and fiscal significance.

That conclusion is consistent with this Court's treatment of employee grievances in *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), and refutes the notion that Janus' position will "constitutionalize every workplace grievance." State Br. 13. Whether a grievance rises to a matter of public concern depends on that particular grievance. *Guarnieri*, 564 U.S. at 398. Some may not, such as "[t]he $338 payment at issue in *Guarnieri* [that] had a negligible impact on public coffers." *Harris*, 134 S. Ct. at 2642 n.28. But union contract enforcement activities as a whole affect matters of public concern.

B. *Abood* Conflicts with *Harris*, *Knox*, and Other Precedents Subjecting Compelled Association and Speech to Heightened Scrutiny.

1. a. The Court has held that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan v. Republican Party*, 497 U.S. 62, 76 (1990). Respondents nevertheless argue that strict and exacting scrutiny precedents do not apply when government acts as an employer. The problem with this argument is that the Court has held such scrutiny does apply when the government forces its employees to subsidize political parties or unions. *See Knox*, 567 U.S. at 310; *Rutan*, 497 U.S. at 74; *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980); *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion). Even

Abood applied heightened scrutiny to union fees for political activities. 431 U.S. at 233-35.

Respondents retort that, in those instances, the government did not act pursuant to employer-related interests. State Br. 32; AFSCME Br. 25. But the government's proffered interest does not dictate the level of scrutiny. The First Amendment *injury* does. The government's interest affects whether that scrutiny is satisfied.

Elrod is instructive. The plurality opinion explained that the "inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice," 427 U.S. at 355, and found compelled political association to infringe on employee First Amendment rights. *Id.* at 360-62. The plurality next stated that "[b]efore examining [petitioners'] justifications, . . . it is necessary to have in mind the standards according to which their sufficiency is to be measured," and held that "a significant impairment of First Amendment rights must survive exacting scrutiny." *Id.* at 362. Only then were the government's alleged interests as an employer examined. *Id.* at 364. Those interests were held inadequate because "less drastic means for insuring government effectiveness and employee efficiency are available to the State." *Id.* at 336.

The same analysis and result applies here. Because "an agency-fee provision imposes a significant impingement on First Amendment rights, . . . [it] cannot be tolerated unless it passes exacting First

Amendment scrutiny." *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310-11) (internal punctuation omitted). The provision fails that scrutiny because less restrictive means are available. *See* Pet.Br. 36-52.

b. Similar reasoning applies to the State's claim (at 36) that agency fees are "authorized by the State in its capacity as an employer." Even if accurate, at most that could affect the strength of the State's interest. But it would not change the requisite level of First Amendment scrutiny.

The State's claim is inaccurate because the government does not act solely as an employer when it compels employees to subsidize union advocacy. That advocacy can have significant effects on government policies and budgets, and thus on the public at large. *See Harris*, 134 S. Ct. at 2632. There are millions of tax dollars at stake in AFSCME's bargaining with Illinois alone. Pet.Br. 6-7. Respondents' own amici claim union bargaining has had a substantial impact on governmental policies that concern education (Am. Fed. of Teachers Amicus Br. 15-27), child welfare (Child Protective Service Workers Amicus Br. 5-13), and minority rights (e.g., Human Rights Campaign et al. Amicus Br. 10-17). Given that union bargaining affects the government not just as an employer, but also as sovereign, it follows that forcing employees to subsidize that advocacy infringes on their rights not just as employees, but as citizens.

c. The *Pickering* test is not the proper method to evaluate this infringement for reasons previously stated. *See* Pet.Br. 22-24; U.S. Br. 23-26. *Pickering v. Board of Education*, 391 U.S. 563 (1968) "provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014). The balancing test is predicated on this Court's finding that, depending on the speech at issue and other factors, the "government's countervailing interest in controlling the operation of its workplaces" can justify speech restrictions. *Id.*

To apply the *Pickering* test here, the Court would have to assume that the government has overriding interests in forcing employees to pay for union advocacy. But that assumption is the dispositive question. And that assumption is unwarranted because the government's interest as an employer is in protecting workplace operations *from* employee expressive activities and politicization, not in forcing employees to support expressive political activities to keep their jobs. Pet.Br. 24.

2. AFSCME asserts (at 17-20) that originalism supports deferential review of agency fees. That is audacious given that compulsory unionism did not take root in the public sector until the 1960's. Pet.Br. 54. It is also audacious given that the Framers had a dim view of government-compelled belief. *See Machinists v. Street*, 367 U.S. 740, 790 (1961) (Black J., dissenting); Center for Const. Juris. Amicus Br. 12-

15; Cal. Educators Amicus Br. 16-18. The "views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment," which "leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money . . . to urge ideologies and causes he believes would be hurtful to the country." *Street*, 367 U.S. at 790 (Black J., dissenting)

Madison also was concerned about factions, by which he meant "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." *The Federalist No. 10* (J. Madison). Madison and other Framers likely would have been aghast at governments regimenting their workforces into involuntary, artificially-powerful factions for petitioning the government for a greater share of scarce public resources. *See* Edwin Vieira, *"To break and control the violence of faction," The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* 17-23 (Lib. Cong. No. 80-65161, 1980).

The pre-1950's "dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment," *Connick v. Myers*, 461 U.S. 138, 143 (1983), does not support applying *Pickering* to this case. Returning to that dogma would require overruling *Pickering* and over sixty years of other unconstitutional-condition precedents. *See id.* at 144-45 (discussing cases). Given that AFSCME does not

argue for that drastic result, its discussion of the right-privilege distinction (at 2-4, 17-19) is pointless. As long as this Court continues to maintain, as it has "time and again[,] that public employers may not condition employment on the relinquishment of constitutional rights," *Lane*, 134 S. Ct. at 2377, it follows that public employment cannot be conditioned on citizens relinquishing their First Amendment right not to support factions whose agendas they may oppose.

3. Illinois argues (at 28) that "agency fees support the activities of a mandatory association," and that "the governing standard for mandatory associations . . . asks whether the challenged fee supports activities that further the non-speech related interests justifying the association." The State is right that an exclusive representative is a mandatory association. Pet.Br. 48-50. The State may be right on its second point with respect to *non*-expressive associations that do not trigger First Amendment scrutiny, such as the agricultural marketing cooperative upheld on rational-basis review in *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457, 460-62, 477 (1997).

But the State is wrong in thinking that this standard applies to compelled *expressive* association. That triggers exacting scrutiny. *See Dale*, 530 U.S. at 658-59; Pet.Br. 19-20. An exclusive representative epitomizes an expressive association, as its principal function is to speak with the government. This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

The State, after acknowledging that an exclusive representative is a mandatory association (at 28), later inconsistently argues (at 41) that employees are not associated with their representative or its speech. *See also* AFSCME Br. 39-40.[1] That makes as much sense as saying that principals are not associated with their agents. Unions cannot speak and contract for employees, and yet employees not be associated with their proxy's speech and contracting. *See* Pet.Br. 48-50.

Minnesota State Board v. Knight, 465 U.S. 271 (1984) is not to the contrary. *Knight* concerned only the constitutionality of *excluding* employees from union meetings with the government. The sole "question presented" was whether that "restriction on [employee] participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* at 273.[2] Reasoning that "[t]he Constitution does not grant to members of the public generally a right to be heard

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[1] AFSCME is correct that this case does not present the question "whether the First Amendment permits exclusive representation" (at 39). The contours of this expressive association are, however, relevant to whether employees can be forced to subsidize it. *See* Pet.Br. 37-52.

[2] The associational argument *Knight* addressed likewise only concerned whether "Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" infringed on associational rights by indirectly pressuring them to join the union. *Id.* at 288.

by public bodies making decisions of policy," *id.* at 283, the Court concluded that the employees were not "unconstitutionally denied an opportunity to participate in their public employer's making of policy," *id.* at 292. *Knight*'s holding that the government can choose to whom it *listens* says nothing about the government's ability to dictate who *speaks* for individuals vis-à-vis the government.

Overall, there is no reason for the Court to abandon its holdings in *Harris*, 134 S. Ct. at 2639, and *Knox*, 567 U.S. at 310, that compelled subsidies for union speech are subject to heightened scrutiny. This, in turn, means the Court should abandon *Abood*, whose failure to apply that scrutiny conflicts with *Harris*, *Knox*, and four lines of precedent. Pet.Br. 18-26.

C. *Abood* Is Unworkable.

The State argues (at 54) that *Abood* has proven workable because "the Court has addressed the line between chargeable and nonchargeable expenses in the public sector twice, in [*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991)] and *Locke v. Karass*, 555 U.S. 207 (2009)." But the Court fractured on that question in *Lehnert*, and left critical issues unresolved in *Locke*, *see* 555 U.S. at 221 (Alito, J., concurring). The State forgets that the line is so blurred that *Knox* had to reverse a lower court decision holding it constitutional to force employees to pay for union ballot initiative campaigns. 567 U.S. at 320-21.

The State's argument is not responsive to the most important way in which *Abood*'s framework is un-

workable: it does not adequately protect employees' First Amendment rights because it depends on unions to determine, under vague and subjective criteria, what fees they can constitutionally seize from nonmembers. Pet.Br. 27-32. Respondents propose no alternative way to fix *Abood*'s practical flaw.

D. Reliance Interests Do Not Justify Retaining *Abood*.

The existence of compulsory fee requirements in twenty-two states is not, contrary to Respondents' positions, reason for retaining *Abood*. It is reason for overruling *Abood*, as it demonstrates the scale of the First Amendment violations that decision is inflicting. Because of *Abood*, an estimated five million public employees are being denied their basic right to choose whether to support political advocacy. Pet.Br. 1. "If it is clear that a practice is unlawful," as it is here, "individuals' interest in its discontinuance clearly outweighs any . . . entitlement to its persistence." *Ariz. v. Gant*, 556 U.S. 332, 349 (2009).

Overruling *Abood* will not undermine *Guarnieri*, *Garcetti*, and related cases that permit legitimate restrictions on employee speech and grievances. To again hold that "the core union speech involuntarily subsidized by dissenting public-sector employees . . . [concerns] issues such as wages, pensions, and benefits [that] are important political issues," *Harris*, 134 S. Ct. at 2632, will not mean every individual employee utterance or grievance also is political speech. *See supra* 4-5. And to hold that the government lacks

an overriding interest in forcing employees to pay for union advocacy will not mean that government employers lack overriding interests in restricting some employee speech. *Id.* at 6-7.

Nor will overruling *Abood* undermine other lines of precedent. The Court recognized that *Keller v. State Bar*, 496 U.S. 1 (1990), can stand on its own two feet in *Harris*, 134 S. Ct. at 2643-44. The Court expressly decided *not* to apply *Abood* to mandatory fees in *Johanns v. Livestock Marketing Ass'n* because the fees funded government speech, 544 U.S. 550, 559-62 (2005); in *Glickman* because the fees funded a non-expressive economic association, 521 U.S. at 469-70 & n.14; and in *Board of Regents v. Southworth* because of *Abood*'s workability problems, among other reasons, 529 U.S. 217, 230 (2000). *Abood* is "an anomaly," *Knox*, 567 U.S. at 311, which can safely be excised from this Court's jurisprudence.

E. *Abood* Should Be Overruled.

1. Respondents have failed to rebut the four reasons *stare decisis* does not justify retaining *Abood*. Pet.Br. 34-35; *see* Cato Amicus Br. 4-11. In fact, they have strengthened the case against *stare decisis* by offering new justifications for *Abood*.

Unlike Respondents, *Abood* did not deem collective bargaining to be internal employee speech, but found that it "may be properly termed political." 431 U.S. at 231. *Abood* did not opine on the government's special interests as an employer, and mentioned *Pickering* only in a footnote that addressed "exceptions not

pertinent here." *Id.* at 230.[3] *Abood* did not apply the Court's mandatory association precedents to agency fees for bargaining purposes, but only to compulsory fees for political and ideological activities, *id.* at 233-35. Respondents' primary arguments are not those upon which the *Abood* Court relied.

Abood was, instead, predicated on the proposition that two private sector cases had "all but decided the constitutionality of compulsory payments to a public-sector union." *Harris*, 134 S. Ct. at 2632. Respondents barely defend that reasoning, likely because the Court subsequently recognized that *Abood* "seriously erred" in relying on it. *Id.*

When, as here, "neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished." *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010). *Stare decisis* does not require retaining *Abood* notwithstanding its infirmities.

2. AFSCME, after having moved the district court to decide the case on the pleadings, now protests (at 53-55) that a record greater than the pleadings is needed to decide the case. Not so. *Abood* was decided on the pleadings. 431 U.S. at 213 n.4. It can be overruled on the same basis, as its flaws are legal in nature. No unknown facts can save *Abood*.

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[3] That the briefing in *Abood* discussed *Pickering* and similar cases, *see* State Br. 25, but the opinion barely did so, only further proves that *Abood* did not rely on those cases.

Allowing AFSCME to "interrogate Janus' claim" about "the specific areas on which Janus disagrees with the position AFSCME takes" (at 55) would reveal no information material to *Abood's* propriety. It makes no difference why Janus and others do not want to support AFSCME's advocacy. *See* Pet.Br. 52, 62. It is enough under the First Amendment that Janus and other nonmembers subject to Illinois' agency fee statute did not consent to pay for that speech. *Id.* That is established by the statute's terms. 5 Ill. Comp. Stat. 315/6(e).

II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny.

1. Respondents do not argue that agency fee requirements survive strict or exacting scrutiny, except in a conclusory footnote. AFSCME Br. 30 n.9. In response to Janus' argument that agency fees are not necessary for exclusive representation, Illinois claims that "misses the point" (at 44), and AFSCME says that "necessity is not the standard" (at 38). But, narrow tailoring and least-restrictive-means *are* the standard under strict and exacting scrutiny, respectively. Pet.Br. 18-21.

The latter is also the standard *Harris* used. *Harris* recognized that "a critical pillar of the *Abood* Court's analysis rests on [the] unsupported empirical assumption . . . that the principle of exclusive representation in the public sector is dependent on a union or agency shop," and held Illinois' agency fee unconstitutional as applied to personal assistants because

"this assumption is unwarranted." 134 S. Ct. at 2634; *see id.* at 2639-41. Respondents do not defend that assumption here.

Illinois claims Janus' positions "that exclusive representation confers benefits on unions, Pet.Br. 37-43, and that the costs of fair representation are overstated, Pet.Br. 45-47 . . . are similarly beside the point." State Br. 45.[4] To the contrary, they are the reasons why agency fees are unnecessary for exclusive representation—for a union, its benefits are great and its unwanted costs are low. Exclusive representative authority is not a burden imposed on unions, but rather is an extraordinarily valuable power that unions covet and voluntarily assume.

Respondents argue agency fees "fairly distribute the costs of exclusive representation," State Br. 42, and "prevent[ ] unfair free-riding by non-members," AFSCME Br. 34. But fairness is not a government interest. "Fair" is an adjective. And it is an adjective unfitting for agency fees. There is nothing legally "fair" about violating someone's First Amendment rights. Nor is there anything equitably "fair" about forcing individuals to pay for union representation they may not want and that may harm their rights and interests. Pet.Br. 48-53.

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[4] The State's comment that these positions are also not supported by the record is belied by the fact that they are legal in nature. They are also asserted in the complaint. Pet.App. 12a.

The State's rejoinder (at 42-43) is that some employees who believe they benefit from union advocacy may also not want to pay for it. The same can be said of most interest group advocacy, and that alone does not justify compelling support for it. *See Harris*, 134 S. Ct. at 2638; *Knox*, 567 U.S. at 311. If anything, the membership recruitment advantages that come with exclusive representation make so-called "free-riding" *less likely* than in other contexts. Pet.Br. 40-43.

Respondents' amici's agency fee justifications are even less credible. Several claim forced fees are needed so that union members do not resent nonmembers. E.g., Mayor Garcetti *et al.* Amicus Br. 9-10. But the government cannot force one person to support speech in violation of his or her First Amendment rights just to please someone else. Several governmental amici claim agency fees make unions less responsive to their members, and thus more amenable to cooperating with the government. *See id.*; Gov. Wolf *et al.* Amicus Br. 22-24; L.A. County's Dep't of Health Services *et al.* Amicus Br. 24-27. Even if agency fees had a tranquilizing effect on union officials, which is doubtful, the government cannot force unconsenting individuals to subsidize an advocacy group just to placate it.

Respondents have not come close to meeting their burden of proving that agency fees are a narrowly tailored or least restrictive means for collective bargaining. In fact, their argument would not satisfy even a balancing test or lesser form of First Amendment scrutiny. Pet.Br. 25 n.11; U.S. Br. 26-29.

2. The Court, therefore, need not reach whether "labor peace" is a compelling enough interest to justify an agency fee. If the Court reaches this issue, it is not. *See* Pet.Br. 56-59; Cato Amicus Br. 11-18; Center for Const. Juris. Amicus Br. 15-18. In fact, Respondents hardly defend *Abood*'s conception of the labor peace interest, which was avoiding "conflicting demands from different unions." 431 U.S. at 221. Respondents' inability to defend *Abood* on its terms is yet another strike against *stare decisis*.

Illinois' asserted interest in dealing with an exclusive representative is the same attenuated interest the Court rejected in *Harris*, 134 S. Ct. at 2640-41: that it enables Illinois to obtain "feedback" from represented individuals, which in turn leads to better policies and enhanced productivity. State Br. 38, 40;[5] *see* AFSCME Br. 40-41. In *Harris*, the Court rhetorically inquired, "[w]hy are [voluntary] dues insufficient to enable the union to provide 'feedback' to a State that is highly receptive to suggestions for increased wages and other improvements?" 134 S. Ct. at 2641. Recognizing that many "groups are quite

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[5] Illinois also tersely claims (at 39) that exclusive representation is "effective in avoiding strikes." The notion that unionizing employees reduces union strikes is counter-intuitive, to say the least. It is also wrong. *See* Freedom Foundation Amicus Br. 8-16. Even if the claim were factually plausible, the government cannot force employees to subsidize unions, in violation of their First Amendment rights, just to appease belligerent unions. That would make agency fees a form of protection money.

successful even though they are dependent on voluntary contributions," the Court held this "feedback" rationale "falls far short of what the First Amendment demands." *Id.* It should do so again.

The feedback rationale fails for other reasons, too. *First*, subsidies for speech cannot be justified by an interest in generating speech itself. *United Foods*, 533 U.S. at 415-16. *Second*, states do not have a "compelling" need for union policymaking advice. *Third*, there exist means to obtain employee feedback, such as meetings and surveys, far less onerous than forcing employees to subsidize a mandatory advocate. *Finally*, states can change their employment policies without unions demanding that they do so. Pet.Br. 59-60. The State's feedback justification is not a compelling interest that justifies the First Amendment injury agency fee requirements inflict on employees.

III. The Court Should Hold It Unconstitutional to Seize Agency Fees from Nonmembers.

1. AFSCME's last-ditch defense is that the Court should not hold Illinois' agency fee statute facially invalid, but should remand the case for determination of which specific union activities are constitutionally chargeable (at 46-47, 53-54). This is unnecessary for three reasons.

First, the IPLRA authorizes the deduction of a fee for "the costs of [1] the collective bargaining process, [2] contract administration and [3] pursuing matters affecting wages, hours and conditions of employ-

ment." 5 Ill. Comp. Stat. 315/6(e). If the Court holds it unconstitutional to require employees to pay for these *categories* of expressive activities, as it should, the statute is facially unconstitutional. In fact, it would be enough if most of these activities are constitutionally nonchargeable, for "[i]n the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted).

Second, a public sector union's activities are interrelated: bargaining with government to adopt certain policies; contractual actions to enforce those policies; legislative lobbying to fund those policies or facilitate their adoption; electoral activities to elect government officials who support those policies; and administrative activities to provide the organizational backbone for the foregoing. All are parts of the same political machine. Or, as AFSCME's constitution puts it, "[f]or unions, the work place and the polling place are inseparable . . ."[6] It violates the First Amendment to force nonmembers to subsidize these advocacy groups in any respect.[7]

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[6] https://www.afscme.org/news/publications/afscme-governance/afscme-constitution/preamble (last visited Jan. 30, 2018).

[7] To the extent a public sector union engages in activities completely unrelated to influencing or dealing with the government, there is no justification to force public employees to subsidize those activities.

Third, even if it were theoretically possible to separate an advocacy group such as AFSCME into expressive and non-expressive components—which it is not—there is no workable way to do it. Tellingly, Respondents suggest no alternative test to unravel this Gordian Knot. The only solution is to cut it by holding all public-sector agency fees unconstitutional.

2. This Court's holding should provide that unions "may not exact any funds from nonmembers without their affirmative consent." *Knox*, 567 U.S. at 322; *see* Cal. Educators Amicus Br. 27-34; Rebecca Friedrichs Amicus Br. 30-32. That holding would be within the question presented for the same reason it was within the second question presented in *Knox*, 567 U.S. at 322 n.9. If the Court overrules *Abood*, it needs to delineate a constitutional rule that identifies from whom unions cannot seize compulsory fees.

The Court also must speak to this issue to resolve the facial challenge. The IPLRA authorizes the seizure of agency fees from nonmembers. 5 Ill. Comp. Stat. 315/6(e). The Court must decide whether that authorization is invalid on its face, or only invalid as applied to objecting nonmembers.

The statute is facially invalid because it violates the First Amendment to compel individuals to pay for speech even if they do not object to its content. It is enough that they did not choose to subsidize that speech. *See* Pet.Br. 52-53.

AFSCME quotes (at 58) this Court's observation in *Davenport v. Washington Education Ass'n*, 551 U.S.

177, 181 (2007), that prior cases did not mandate affirmative consent. The Court, however, subsequently explained in *Knox* that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." 567 U.S. at 312. The Court's prior cases did not "explore the extent of First Amendment protection for employees who might not qualify as active 'dissenters' but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union." *Id.* at 313.

AFSCME points out (at 58-59) that in judicial proceedings "individuals affirmatively must invoke their own constitutional rights." But that is due to the adversarial structure of litigation. This case concerns a "union's extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport*, 551 U.S. at 187. Almost no one appreciates an interest group taking his or her money without permission, no matter what the cause. And "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312 (citation omitted). The Court should recognize that, absent affirmative consent, it is unconstitutional for states and unions to take nonmembers' money for union speech.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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